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No. 2008 – 3126, 3127

In The
# Supreme Court of the United States

DOM WADHWA, M.D., *pro se*
*Petitioner,*

v.

MERIT SYSTEMS PROTECTION BOARD,
*Respondent.*

JEFFREY A. GAUGER, Esquire,
Attorney for the Respondent
B. CHAD BUNGARD, Esquire,
Attorney for the Respondent
CALVIN M. MORROW, Esquire,
Attorney for the Respondent

**On Petition For A Writ of Certiorari**
**To The United States Court of Appeals**
**For The Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit has rendered an opinion regarding jurisdiction that is in conflict with its prior opinion in the case of *Wadhwa vs. Merit Systems Protection Board, Fed. Cir. No. 2008 – 3176, -3177*.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported in Appendix (9 to 14). The Initial Decisions and Final Orders of the Merit Systems Protection Board ("Board") are reported in Appendix (15 to 40). A timely appeal for a petition for review was denied by the Board on January 29, 2008. A timely appeal to the United States Court of Appeals for the Federal Circuit was filed on February 26, 2008.

## JURISDICTION

The Court of Appeals for the Federal Circuit filed its decision on October 7, 2008 on petitioner's lack of jurisdiction for his appeal to the Board and thereafter entered its order denying petitioner's motion for rehearing on October 31, 2008. This court has jurisdiction under 28 U.S.C. § 1254 (1) to review the U.S. Court of Appeals for the Federal Circuit's decision by writ of certiorari.

## BASIS FOR INVOKING JURISDICTION

The basis for invoking the jurisdiction of the U.S. Supreme Court is that the U.S. Court of Appeals for the Federal Circuit has rendered an opinion in my case that conflicts with its prior opinions and the opinion involves fundamental issues of broad public importance requiring determination by the U.S. Supreme Court.

## STATEMENT OF THE CASE

**Issue One**: Involuntary transfer (Directed Reassignment) of Petitioner from the VA Northern Indiana Health Care System (NIHCS) to the Philadelphia VA Medical Center (PVAMC).

**Issue Two**: Ten Member Panel at PVAMC removed Petitioner from clinical position at PVAMC as a "staff adjustment" in violation of Title 38 employees Reduction In Force (RIF) procedures.

**Issue Three**: Petitioner's demotion to a nonclinical position at PVAMC and reduction in pay at PVAMC as part of a "staff adjustment" violate the Code of Federal Regulations.

**Issue Four**: Petitioner's reduction in pay at PVAMC violates the Preservation of Pay regulation in the VHA Handbook.

## BRIEF DISCUSSION OF EACH ISSUE

**Issue One: Involuntary transfer (Directed Reassignment) of Petitioner from the VA Northern Indiana Health Care System (NIHCS) to the Philadelphia VA Medical Center (PVAMC).**

This case arises out of my involuntary transfer on October 15, 2006, from my clinical physician position at the Philadelphia VA Medical Center ("PVAMC") to a clinical physician position at the Northern Indiana Health Care System ("NIHCS").

After **three workdays** at NIHCS I was placed on administrative leave pending investigation regarding my professional conduct and professional competency, because of untruthful and unsubstantiated information provided by my supervisors at PVAMC to NIHCS.

On January 21, 2007, I was involuntarily **reassigned** back to PVAMC (Directed Reassignment) by **William F. Feeley, VA Deputy Undersecretary for Health for Operations and Management**, to face charges of removal from my employment of over twenty years, **based on this untruthful and unsubstantiated information**.

**Issue Two: Ten Member Panel at PVAMC removed Petitioner from clinical position at PVAMC as a "staff adjustment" in violation of Title 38 employees Reduction In Force (RIF) procedures.**

In January 2007, a ten member panel composed of Agency Officials at PVAMC removed me from my clinical position and demoted me to a nonclinical position with a drop in annual pay, as a "staff adjustment," based on untruthful and unsubstantiated information provided by my supervisors at PVAMC to this ten member panel.

The Agency failed to follow Title 38 rules when it conducted the "staff adjustment" and separated me from my full-time clinical physician position in Primary Care. Title 38 employees are entitled to **RIF procedures** and the agency has **failed to afford me** those procedures when separating me from my full-time permanent physician position in Primary Care, pursuant to its "staff adjustment."

A permanent tenure would be consistent with DVA's appointing authority under 38 U.S.C. § 7401 (1) and thus, confer RIF appeal rights. *Nguyen*, 92 *M.S.P.R.* 326.

**Issue Three: Petitioner's demotion to a nonclinical position at PVAMC and reduction in pay at PVAMC as part of a "staff adjustment" violate the Code of Federal Regulations.**

In September 2007, my permanent placement into a nonclinical position with a drop in annual pay by $2,057 and denial of $5000 performance pay by the Agency were the direct result of my demotion as part of this "staff adjustment." Thus, RIF regulations from *James v. von Zemensky, 284 F. 3d 1310, 1314-15 (Fed. Cir. 2002)* apply in my situation.

Also, OPM recently passed new regulations regarding the rate of basic pay, which may sometimes include locality pay. See 5 C.F.R. § 531.203. These new regulations regarding rates of pay due to a demotion or **reduction in pay are appealable under the RIF regulations** at *Part 351 of Title 5 of the Code of Federal Regulations.*

**Issue Four: Petitioner's reduction in pay at PVAMC violates the Preservation of Pay regulation in the VHA Handbook.**

My drop in salary by the Agency was a violation of the regulations in *VHA Handbook 5007/21 page IX -19, Preservation of Pay,* which states "The amount of annual pay (base plus market) paid to a physician as a result of the January 8, 2006, conversion may not be less than the amount of pay (base plus special pay and GAP, if applicable) paid to the individual on the day before the conversion (plus any increases to base pay or mandatory adjustments to special pay effective on January 8, 2006) for as long as an individual remains in the same assignment."

The **Opinion and Order**, from October 7, 2008, from the United States Court of Appeals for the Federal Circuit **does not address the Preservation of Pay regulation** in VHA Handbook 5007/21 page IX -19.

## REASONS FOR GRANTING THE PETITION

The Opinion and Judgment for Appeal Case No. 2008 – 3176, -3177 in the United States Court of Appeals for the Federal Circuit on October 7, 2008 did not take into consideration the four issues discussed in this appeal when it made its ruling that the Board did not err in dismissing my appeal for lack of jurisdiction.

## CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

sd/
Dom Wadhwa, M.D., *pro se*
*Petitioner*

Dated: November 26, 2008

**THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRUIT**
**717 MADISON PLACE, NW.**
**WASHINGTON, DC 20439**

DOM WADHWA, M.D.
Appellant (*pro se*)

v.

Department of Veterans Affairs,
Defendant

**APPELLANT'S MOTION TO CONSOLIDATE**

The Appellant hereby requests The United States Court of Appeals for the Federal Circuit to consolidate the two MSPB Cases with Docket Numbers PH-0752-07-0301-I-1, Filed on March 23, 2007 and PH-3443-07-0638-I-1, Filed on September 20, 2007, because there is an overlap of these two MSPB cases.

**Case No. 1**
**MSPB Docket No. PH-0752-07-0313-I-1**

I made two appeals to the MSPB, on March 23, 2007 and on April 5, 2007, that were consolidated under the same docket number PH-0752-07-0313-I-1, as follows:

1. On March 23, 2007, I submitted my first appeal to the MSPB regarding my *reduction in pay* by Dr. John Murphy, Director of Primary Care, and by Dr. Michael Grippi, Chief of Medicine at the Philadelphia VA Medical Center (PVAMC).

2. On April 5, 2007, I submitted my second appeal to the MSPB regarding my *involuntary temporary nonclinical assignment* to the Compensation & Pension (C&P) section, a Prohibited Personnel Practice, by Dr. Murphy and by Dr. Grippi.

3. On April 26, 2007, Administrative Judge (AJ) issued an order to *close* the case after a discussion with her by the Agency's attorney at PVAMC, regarding the jurisdictional issue for my appeal to the MSPB.

4. On April 27, 2007, I was denied the opportunity by the Agency's attorney to participate in a telephonic status conference with the AJ, during which the issue of jurisdiction was discussed.

5. On June 22, 2007, the AJ reopened the jurisdictional record and ordered my attorney, on my behalf, to file a brief within 14 days of this order. The Agency contends that its attorney did not receive a copy of a brief regarding the jurisdiction issue from my attorney. Thus, on July 24, 2007, the Agency's

attorney filed a motion to dismiss my appeal to the MSPB, based on her claim that she did not receive this brief from my attorney.

6. The Initial Decision Order from the AJ was issued on July 24, 2007. This is the same day that the Agency's attorney filed the Agency's motion to dismiss my appeal.

7. On July 12, 2007, Dr. John Murphy, my first level supervisor, handed me the "Performance Pay Recommendation & Approval" form (VA Form 10-0432). This VA Form 10-0432 was for the period of July 1, 2006 to September 30, 2006, which was when I was performing my clinical duties as an attending physician in Primary Care. This form was signed by Dr. Michael Grippi, my second level supervisor, and dated by him as November 17, 2006. This same VA Form 10-0432 was not signed and dated by Dr. Murphy in the designated area on this form. This VA Form was not presented to me at or around the time the decision was made to not grant me $5000 of performance pay by Dr. Murphy and by Dr. Grippi. Also, there was no substantiating documentation given to me by Dr. Murphy or by Dr. Grippi to support their decision to grant no performance pay to me.

8. On July 19, 2007, I learned that Dr. Murphy and Dr. Grippi had prepared a high

satisfactory Interim Proficiency Report for me in my *involuntary temporary nonclinical* assignment in the Compensation & Pension (C&P) section. Dr. Murphy and Dr. Grippi intended to use this high satisfactory Interim Proficiency Report to permanently prevent my return to my over twenty-one year tenured position in Primary Care, and they intended to use this Interim Proficiency Report to permanently deprive me of my ability to maintain my over twenty-one year clinical privileges in the field of Primary Care Medicine within the Department of Veterans Affairs.

The consequence of this aforementioned action by Dr. Murphy and by Dr. Grippi is that I will be permanently deprived from practicing clinical medicine for the rest of my professional career within the Department of Veterans Affairs. I must practice in a clinical assignment in order to maintain my clinical privileges in Primary Care Medicine within the VA.

**Case No. 2**
**MSPB Docket No. PH-3443-07-0638-I-1**

I made an appeal to the MSPB, on September 20, 2007, under the docket number PH-3443-07-0638-I-1, as follows:

a. I received a drop in my annual income in January 2007. I was not offered an explanation for this drop in salary by my immediate supervisors, John Murphy, M.D., Director of Primary Care, and Michael Grippi, M.D., Chief of Medicine (i.e., a demotion).

b. Effective September 12, 2007, I am *permanently* assigned to the Compensation & Pension (C&P) section by agency officials, Dr. Murphy and Dr. Grippi (i.e., a permanent separation from my clinical position as an attending physician in Primary Care). The C&P position is a nonclinical job in which I perform *clerical duties* by completing C&P forms for otherwise well veterans, who are seeking compensation for service-related injuries and illnesses.

c. At the time of my assignment to the C&P section in January 2007, Dr. Murphy and Dr. Grippi stated to me that there was a *critical need* in the C&P section at PVAMC. The agency identified this staffing need in the C&P section to meet the Medical Center Director's performance measure of timeliness for completion of C&P examinations. Thus, the agency was realigning its resources to more appropriately support the mission, vision, goals, and objectives (i.e., a staff adjustment).

d. This separation from my clinical position and assignment to a nonclincal position by Dr. Murphy and by Dr. Grippi was initially a staffing adjustment based on the critical need of the medical center. My permanent assignment to the C&P section by these agency officials was a permanent separation from my clinical duties and a permanent assignment to clerical duties.

**Analysis**

In James v. Von Zemenszky, 284 F.3d 1310, 1319-21 (Fed. Cir. 2002), the court held that the Department of Veterans Affairs (DVA) must use Title 5 RIF procedures when conducting a "staff adjustment" involving medical professionals appointed under 38 U.S.C. § 7401(1). In Isabella v. Department of State, 102 M.S.P.R. 259, (2006), the Board stated that the Von Zemenszky court found that "title 5 reduction-in-force provisions applied to Veterans Health Administration (VHA) health-care professionals."

Thus, in my situation, Dr. Murphy's and Dr. Grippi's offer to me of an assignment to a temporary position that was later converted to a permanent position in the C&P section as a "staff adjustment" in lieu of a RIF separation from a full-time position in Primary Care, would be an appealable RIF action.

In determining whether I have made a nonfrivolous allegation of jurisdiction entitling me to a hearing, an administrative judge may consider an agency's documentary submissions. See Dumas, 789 F. 2d at 894; Manning, 742 F. 2d at 1428; see also Hill v. Department of the Air Force, 796 F.2d 1469, 1472 (Fed. Cir. 1986) (Newman, J., additional views). But, to the extent that the agency's evidence constitutes mere factual contradiction of my otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. See Dumas, 789 F.2d at 893-94; see also Ferdon v. U.S. Postal Service, 60 M.S.P.R. 325, 329 (1994).

Here, the AJ did **not** consider the evidence I submitted and decided based on the evidence submitted by the agency.

**Conclusion**

I assert that I was *erroneously* denied a hearing for the two MSPB cases by the Board.

I was simply separated from my over twenty-one (21) year tenured full-time position by only an e-mail notice of separation on September 12, 2007 from Dr. Murphy, my immediate supervisor.

I was then demoted to a permanent nonclinical position in the C&P section via this same e-mail. This sequence of notice of separation of me from Primary Care and my demotion to the C&P section, both via e-mail, avoids the employment contract, avoids RIF procedures and safeguards, and avoids appeal rights.

Dr. Murphy, and Dr. Grippi have conducted a reduction-in-force, and, as agency officials, did not follow the requisite RIF procedures. See 5 U.S.C. §§3501-3504; 5 C.F.R. Part 351 (agencies must follow the Office of Personnel Management regulations when conducting reductions in force).

The agency's failure to apply the RIF regulations to the restructuring that led to the elimination of my position in Primary Care was an impermissible circumvention of the RIF regulations and a violation of my substantive and procedural rights.

Sincerely,

Dom Wadhwa, M.D., *Appellant (pro se)*

Dated: February 26, 2008

*Home Address of Appellant*
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215 E Camden Avenue, H-13
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# United States Court of Appeals for the Federal Circuit

**2008-3176, -3177**

**DOM WADHWA,**
**Petitioner,**

**v.**

**MERIT SYSTEMS PROTECTION BOARD,**
**Respondent.**

**Petition for review of the Merit Systems Protection Board in PH0752070313-I-1 and PH3443070638-I-1.**

Dom Wadhwa, of Moorestown, New Jersey, pro se.

Jeffrey A. Gauger, Attorney, Office of the General Counsel, Merit Systems Protection Board, of Washington, DC, for respondent. With him on the brief were B. Chad Bungard, General Counsel, and Calvin M. Morrow, Acting Assistant General Counsel.

**Appealed from:**
Merit Systems Protection Board
**DECIDED**: October 7, 2008

Before RADER, SCHALL, and PROST, Circuit Judges.

PER CURIAM.

**DECISION**

Dom Wadhwa ("Dr. Wadhwa") petitions for review of two final decisions of the Merit Systems Protection Board ("Board"). Each of the decisions dismissed for lack of jurisdiction an appeal by Dr. Wadhwa to the Board.

Wadhwa v. Dep't of Veterans Affairs, No. PH-0752-07-0313-I-1 (M.S.P.B. Jan. 29, 2008) ("Final Decision I"); Wadhwa v. Dep't of Veterans Affairs, No. PH-3443-07-0638-I-1 (M.S.P.B. Jan. 29, 2008) ("Final Decision II"). The two petitions have been consolidated into a single appeal. We **affirm**.

**DISCUSSION**

Dr. Wadhwa is employed as a physician with the Department of Veterans Affairs ("DVA"). This case arises out of his transfer on October 15, 2006, from his physician position at the Philadelphia VA Medical Center ("PVAMC") to a physician position at the Northern Indiana Healthcare System ("NIHCS"). Dr. Wadhwa was reassigned back to PVAMC on January 21, 2007.

Following his reassignment from NIHCS, Dr. Wadhwa filed two appeals with the Board. In his first appeal, he claimed that his reassignment resulted in a reduction in his

pay or grade. In his second appeal, he claimed that his reassignment constituted a removal. On July 24, 2007, the administrative judge ("AJ") assigned to the appeals issued an initial decision dismissing the reduction-in-pay claim for lack of jurisdiction. Wadhwa v. Dep't of Veterans Affairs, No. PH-0752-07-0313-I-1 (July 24, 2007) ("Initial Decision I"). Subsequently, on October 31, 2007, the AJ issued an initial decision dismissing the removal claim, also for lack of jurisdiction. Wadhwa v. Dep't of Veterans Affairs, No. PH-3443-07-0638-I-1 (Oct. 31, 2007) ("Initial Decision II").

Initial Decision I and Initial Decision II became final decisions of the Board on January 29, 2008, when the Board denied Dr. Wadhwa's petitions for review in Final Decision I and Final Decision II, respectively, for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115(d) (2008).

## II.

We have jurisdiction over Dr. Wadhwa's appeal pursuant to 28 U.S.C. § 1295(a)(9) (2006). Pursuant to 5 U.S.C. § 7703(c) (2006), we must affirm a decision of the Board unless we find it to be "(1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required without procedures

required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." See also Kewley v. Dep't of Health & Human Servs., 153 F.3d 1357, 1361. (Fed. Cir. 1998).

Dr. Wadh(w)a was appointed to his position as a DVA physician under 38 U.S.C. § 7401(1) (2006). For that reason, he is generally not an employee for purposes of filing an appeal to the Board. See 5 U.S.C. § 7511(b)(10) (2006); Bonner v. Dep't of Veterans Affairs Pittsburgh Healthcare Sys., 477 F.3d 1343, 1348 (Fed. Cir. 2007) ("[E]mployees hired under 38 U.S.C. § 7401(1) . . . have never had the right to appeal § 7512-type adverse actions to the MSPB . . . .").

However, employees such as Dr. Wadhwa may appeal to the Board under limited circumstances. In James v. Von Zemenszky, 284 F.3d 1310, 1314-15 (Fed. Cir. 2002), this court held that reduction-in-force ("RIF") regulations apply to DVA health care professionals who are separated by a staff adjustment.

In addition, we stated that "[DVA] health-care professionals enjoy the protections of title 5 RIF procedures along with the right to appeal a RIF separation to the Board." Id. at 1321. RIF appeals to the Board, though, are limited by 5 C.F.R. § 351.901 to appeals by

"employees who are furloughed for more than 30 days, separated, or demoted by the RIF action." Wolf v. Dep't of Veterans Affairs, 317 F.3d 1395, 1396 (Fed. Cir. 2003).

On appeal, Dr. Wadhwa contends that the Board had jurisdiction over his appeals because he was demoted by a RIF action and because, through his reassignment, he suffered loss of pay or grade.

An employee's official position under RIF regulations is defined by grade as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or "SF-50"). In this case, the SF-50 submitted by both parties fails to reflect a loss of pay or grade. The SF-50 indicates that Dr. Wadhwa was transferred from one full-time physician position to another full-time physician position with the same grade. The SF-50 also indicates that Dr. Wadhwa's basic rate of pay at his NIHCS position and at the PVAMC position to which he was reassigned were the same.

Dr. Wadhwa argues, however, that he suffered a loss of grade because the DVA "separated" him from his clinical physician duties and reassigned him to non-clinical physician duties. The contention is without merit. Alteration of duties does not constitute a separation or loss of grade under RIF

regulations. See Aliota v. Dep't of Veterans Affairs, 60 M.S.P.R. 491, 495 (1994) ("As a general rule, the Board does not have appellate jurisdiction over reassignments that do not constitute a reduction in grade or pay, even though reassignment reduces the employee's status, duties, or responsibilities.").

Also without merit is Dr. Wadhwa's contention that he suffered a loss of pay in the form of a $5,000 performance award and $2,257 in locality pay. Loss of pay is calculated on the basis of an employee's rate of basic pay, excluding additional pay of any kind such as locality payments or special rate supplements. See 5 C.F.R. § 531.203 (2008).

Because Dr. Wadhwa did not suffer a loss of either grade or pay, he was not demoted under RIF regulations. Accordingly, the Board did err in dismissing his appeals for lack of jurisdiction. See Talley v. Dep't of the Army, 50 M.S.P.R. 261, 263 (1991).

For the foregoing reasons, the two final decisions of the Board which are on appeal in this case are **affirmed**.

**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**
**NORTHEASTERN REGIONAL OFFICE**

DOM WADHWA,
Appellant,

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DOCKET NUMBER
PH-0752-07-0313-I-1
DATE: July 24, 2007

Adam H. Feinstein, Esquire, Philadelphia,
Pennsylvania, for the appellant.
Stacey Conroy, Esquire, Philadelphia,
Pennsylvania, for the agency.

**BEFORE**
Elizabeth D. Milligan
Administrative Judge

**INITIAL DECISION**

On March 23, 2007, Dom Wadhwa (appellant) petitioned for appeal to the Board claiming that the Department of Veterans Affairs (agency) had reduced his

pay. For the reasons set forth below, the appeal is DISMISSED for lack of jurisdiction.

**ANALYSIS AND FINDINGS**

Background The appellant seeks review of the agency's decision to transfer him from a clinical position to a non-clinical position and alleges that the reassignment affected his pay negatively. He states that he was reassigned from Philadelphia (PVAMC) to Indiana (VA NICHS) on October 14, 2006. Appeal File (AF), Tabs 1, 8, and 9. His salary at the PVAMC was $177,257, and was changed to $175,000 at the VA NICHS because the locality pay was reduced from $60,257.00 to $58,00.00.

His superiors told him that a waiver would be requested so that his pay would be returned to his salary at PVAMC. The agency then decided to return him to the PVAMC, effective January 21, 2007. His pay at that time was $180,040, with the VA NICHS. Upon his return to the PVAMC, his pay was set at $180,040, with the locality pay being $58,000.00 in both positions.

The agency argues that his pay has not been reduced. The appellant argues that his pay would have been higher had he remained at the PVAMC and never been reassigned

because he would have continued to receive the higher locality pay.1 The appellant's base salary in both positions was $122,040.00. AF, Tabs 1, 8 and 9.

In addition, the agency states that the appellant was hired as an excepted service appointment under 38 U.S.C. § 7401(1) and thus holds a position within the Veterans Health Administration that has been excluded from the competitive service and the provisions of Title 5 of the U.S. Code. Therefore, he is not an employee for purposes of filing an appeal with the Board under 5 U.S.C. § 7511(a)(1) or 39 U.S.C. § 1005(a)(4)(A)(ii). AF, Tab 9.

The appellant filed the instant appeal with the Board seeking review of the agency's alleged reduction in pay. AF, Tab 1. Because it appeared that the Board lacked jurisdiction over this appeal, an acknowledgment order was issued outlining the jurisdictional issue, and directing the appellant to file evidence and argument showing that his appeal is within the jurisdiction of the Board. AF, Tabs 11 and 24.

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1 This pay is formally known as the "P&D market pay." AF, Tab 9(4C).

The appellant argued that the agency had reduced his pay by approximately $2,000.00 through a staff adjustment, and as a VHA medical professional, the reduction was an appealable action. AF, Tab 3, 5, 6, 7, and 8.

The agency filed a motion to dismiss the appeal for lack of jurisdiction, arguing that the Board does not have jurisdiction over Title 38 employees. AF, Tab 9.

**Applicable Law on Jurisdiction**

The appellant has the burden of proving jurisdiction by preponderant evidence. 5 C.F.R. § 1201.56(c).

A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985).

An appellant is entitled to a hearing on the issue of Board jurisdiction only if he makes a nonfrivolous allegation that the Board has jurisdiction over his appeal. *Burgess v. Merit*

*Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985).

In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

The appellant has not raised a nonfrivolous allegation of jurisdiction sufficient to warrant a hearing.

The Board has held that an employee appointed under 5 U.S.C. § 7401(1) has generally been excluded from coverage under the provisions of Title 5 and is not an employee eligible to appeal an action to the Board under 5 U.S.C. §§ 7511- 7513. *See Bouchard v. Department of Veterans Affairs*, 104 M.S.P.R. 686, 688-70 (2007).

Under *James v. Von Zemenszky*, 284 F.3d 1310, 1314-15 (Fed. Cir. 2002), the U.S. Court of Appeals for the Federal Circuit held that reduction-in force (RIF) regulations apply to Veterans Health Administrative health care professionals who are appointed under Title 38 and who are separated by a staff adjustment.

Assuming that the appellant might have appeal rights under the above Case law, however, I still find that the action alleged is not appealable to the Board. RIF appeals are limited to employees who are "furloughed for more than 30 days, separated, or demoted by the reduction in force action." *Wolf v. Department of Veterans Affairs*, 317 F.3d 1395, 1396 (Fed. Cir. 2003), *citing*5 C.F.R. § 351.901.

Demotion under the RIF regulations is defined as "a change of an employee while serving continuously within the same agency ...(i) [t]o a lower grade when both the old and the new positions are under the General Schedule or under the same type graded wage schedule; or (ii) [t]o a position with a lower rate of pay when both the old and the new positions are under the same type ungraded wage schedule, or are in different pay method categories." 5 C.F.R. § 2109102(b)(4)(ii).

Here, it appears that the reassignments were conducted under the same pay method categories. The pay plan is noted as "VM" for both reassignments, and the pay basis is "PA." The grade or level is shown as "PHYS," presumably for physicians, and the step or rate is shown as "II." AF, Tabs 9(4A-4C). It also appears that both positions were not in an "ungraded wage schedule."**2**

Therefore, the reassignments do not constitute a change to a lower grade or a change to a position with a lower rate of pay when both the old and the new positions are not under the same type ungraded wage schedule, and are not in different pay method categories.

Thus, the appellant has not raised a non-frivolous allegation that he suffered a demotion under the RIF regulations.**3** *Cf.*

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**2** Title 38 of the U.S. Code, Chapter 74, is the appointing authority for VHA physicians and sets the special pay rates. Section 7404 defines the grade levels. 5 U.S.C. § 7404.

**3** At Part 531 of Title 5 of the Code, OPM recently promulgated new regulations regarding the administration of pay under the general schedule. *See* 5 C.F.R. § 531.203. In *Kile v. Department of the Air Force*, the Board found that the term "rate of basic pay" previously was defined in 5 C.F.R. § Part 531 as "the rate of pay fixed by law or administrative action for the position held by an employee before any

deductions and exclusive of additional pay of any kind." 5 C.F.R. § 531.202 (2006).

Following enactment of the Federal Workplace Flexibility Act of 2004, Pub. L. No. 108-411, 2004 U.S.C.C.A.N. (118 stat.) 2305, which statutorily redefined "rate of basic pay" within the context of graded and pay retention to include locality pay, OPM issued interim regulations that redefined "rate of basic pay" for special rate employees to include, among other types of pay, a "locality rate," in turn defined as a "GS rate ... plus any applicable locality payment." 5 C.F.R. § 531.203 (2006). **Those regulations apply to special pay rate categories such as those at issue here for Title 38 professionals.** *See e.g.*, 5 C.F.R. § 530.308, 531.203, 531.602.

I have not determined whether those regulations apply to the RIF regulations in defining the "rate of pay" for purposes of a demotion under a RIF action. Such a determination is not necessary because the appellant has not shown that the reassignments were to positions in different pay methods or in the same ungraded wage schedule.

I also note that the locality pay did not change for the last reassignment.

The appellant alleges that if the agency had not reassigned him in the first place, he would be receiving higher pay because he lost locality pay in the first reassignment. He did not appeal the first reassignment when it occurred. Thus, issues also arise as to whether the appellant can claim that the second reassignment is a reduction in locality pay because he would have been making more if not for the first reassignment.

In addition, if the appellant is raising the issue of the first reassignment, his appeal of that issue might be untimely. Again, however, it is unnecessary to decide

those issues because the appellant's claim of a reduction in pay does not fit within the definition of demotion for RIF purposes.

*McGauley v. Veterans Administration*, 29 M.S.P.R. 686, 689 (1986) (RIF regulations speak specifically to a demotion rather than a reduction in grade or pay).

The appellant has failed to make a nonfrivolous allegation of jurisdiction sufficient to warrant a hearing. Accordingly, the agency's motion to dismiss the appeal must be GRANTED, and the appeal must be **DISMISSED**.

**DECISION**

The appeal is **DISMISSED**.

FOR THE BOARD:

_____

Elizabeth D. Milligan
Administrative Judge
Phone: (215) 597-9960
Fax: (215) 597-3456

**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

DOM WADHWA,
Appellant,

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DOCKET NUMBER
PH-0752-07-0313-I-1

**DATE**: January 29, 2008

Adam H. Feinstein, Esquire, Philadelphia,
Pennsylvania, for the appellant.
Stacey Conroy, Esquire, Philadelphia,
Pennsylvania, for the agency.

**BEFORE**
Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

**FINAL ORDER**

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge.

We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d).

Therefore, we **DENY** the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

**NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals for the
Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se

Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:
Washington, D.C.

_____

William D. Spencer
Clerk of the Board

**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**
**NORTHEASTERN REGIONAL OFFICE**

DOM WADHWA,
Appellant,

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DOCKET NUMBER
PH-3443-07-0638-I-1

**DATE**: October 31, 2007

Dom Wadhwa, Philadelphia, Pennsylvania, pro se.

Joseph M. Lytle, Philadelphia, Pennsylvania, for the agency.

**BEFORE**
Elizabeth D. Milligan
Administrative Judge

**INITIAL DECISION**

On September 20, 2007, Dom Wadwha (appellant) petitioned for appeal to the Merit Systems Protection Board (Board), seeking

review of the decision by the Department of Veterans Affairs (agency or VA) to reassign him and alleging that the reassignment constituted a reduction in force (RIF) action. For the reasons discussed below, this appeal is DISMISSED.

**ANALYSIS AND FINDINGS**

The appellant was reassigned from his position as a primary care physician at the Philadelphia VA Medical Center (PVAMC) to the Northern Indiana Healthcare System (NICHS) on October 14, 2006. Appeal File (AF), Tab 1. He was reassigned again to the PVAMC on January 21, 2007.

Upon his return, the appellant was placed into a position as a physician in the Compensation and Pension Section (C&P). He argues that he was told the placement would be temporary, but on September 12, 2007, the appellant was informed by his supervisor that he was being permanently reassigned to the C&P position. AF, Tab 6. The appellant petitioned for appeal to the Board from the reassignment action. AF, Tab 1.

Because it appeared that the Board lacked jurisdiction over this appeal, an acknowledgment order was issued outlining the jurisdictional issue, and directing the appellant to file evidence and argument

showing that his appeal is within the jurisdiction of the Board. AF, Tab 2.

The appellant argued that the agency had reduced his pay by its decision not to award him a $5,000.00 performance award and that his placement in a non-clinical position from his original clinical position was a demotion. He argues that he was separated from his earlier clinical position and placed into a permanent position constituting a staff adjustment and a RIF. AF, Tabs 1 and 6.

The agency filed a motion to dismiss the appeal for lack of jurisdiction, arguing that the appellant has not suffered a separation, demotion through either a loss of grade or pay, or a RIF action. Therefore, the Board does not have jurisdiction over this appeal. AF, Tabs 5 and 9. The record on the jurisdictional issue closed on October 15, 2007. AF, Tab 2.

**Applicable Law on Jurisdiction**

The appellant has the burden of proving jurisdiction by preponderant evidence. 5 C.F.R. § 1201.56(c). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to

be true than untrue. 5 C.F.R. § 1201.56(c)(2). The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985).

An appellant is entitled to a hearing on the issue of Board jurisdiction only if he makes a nonfrivolous allegation that the Board has jurisdiction over his appeal. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985).

In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

The appellant has not raised a nonfrivolous allegation of jurisdiction sufficient to warrant a hearing.

The appellant was hired under an excepted service appointment pursuant to 38 U.S.C. § 7401(1) and thus holds a position within the Veterans Health Administration that has been excluded from the competitive service and the provisions of Title 5 of the U.S. Code. Therefore, he is generally not an employee for purposes of filing an appeal with the Board under 5 U.S.C. § 7511(a)(1) or 39 U.S.C. § 1005(a)(4)(A)(ii); *see Bouchard v. Department of Veterans Affairs*, 104 M.S.P.R. 686, 688-70 (2007).

Under *James v. Von Zemenszky*, 284 F.3d 1310, 1314-15 (Fed. Cir. 2002), however, the U.S. Court of Appeals for the Federal Circuit held that reduction-in-force (RIF) regulations apply to Veterans Health Administrative health care professionals who are appointed under Title 38 and who are separated by a staff adjustment.

Upon review, I find that the appellant's case does not fall within the RIF exception defined by *Von Zemensky*. RIF appeals are limited to employees who are "furloughed for more than 30 days, separated, or demoted by the reduction in force action." *Wolf v. Department of Veterans Affairs*, 317 F.3d 1395, 1396 (Fed. Cir. 2003), *citing* 5 C.F.R. § 351.901. Demotion under the RIF regulations is defined as "a change of an employee while

serving continuously within the same agency ...(i) [t]o a lower grade when both the old and the new positions are under the General Schedule or under the same type graded wage schedule; or (ii) [t]o a position with a lower rate of pay when both the old and the new positions are under the same type ungraded wage schedule, or are in different pay method categories." 5 C.F.R. § 2109102(b)(4)(ii).

The Standard Form (SF) 50 submitted by both parties shows that the appellant did not suffer loss of grade or pay in the reassignment. AF, Tabs 5 and 7. The reassignments were conducted under the same pay method categories.

The pay plan is noted as "VM" for both reassignments, and the pay basis is "PA." The grade or level is shown as "PHYS," presumably for physicians, and the step or rate is shown as "II." AF, Tabs 5(4B) and 7. The basic rate of pay and additional pay are $122,040 and $58,000 respectively for both positions. Thus, the appellant did not receive any loss of grade or pay.

The appellant argues that on July 12, 2007, he suffered a loss of pay when he was not given a performance award of $5,000.00. AF, Tab 6. The loss of a performance award is not a demotion under the RIF regulations.

Thus, the appellant has not raised a nonfrivolous allegation that he suffered a demotion under the RIF regulations.1 *Cf*

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1 At Part 531 of Title 5 of the Code, OPM recently promulgated new regulations regarding the administration of pay under the general schedule. *See* 5 C.F.R. § 531.203.

In *Kile v. Department of the Air Force*, the Board found that the term "rate of basic pay" previously was defined in 5 C.F.R. § Part 531 as "the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind." 5 C.F.R. § 531.202 (2006).

Following enactment of the Federal Workplace Flexibility Act of 2004, Pub. L. No. 108-411, 2004 U.S.C.C.A.N. (118 stat.) 2305, which statutorily redefined "rate of basic pay" within the context of graded and pay retention to include locality pay, OPM issued interim regulations that redefined "rate of basic pay" for special rate employees to include, among other types of pay, a "locality rate," in turn defined as a "GS rate ... plus any applicable locality payment." 5 C.F.R. § 531.203 (2006).

**Those regulations apply to special pay rate categories such as those at issue here for Title 38 professionals.** *See e.g.*, 5 C.F.R. § 530.308, 531.203, 531.602.

I have not determined whether those regulations apply to the RIF regulations in defining the "rate of pay" for purposes of a demotion under a RIF action. Such a determination is not necessary because the appellant has not shown that the reassignments were to positions in different pay methods or in the same ungraded wage schedule.

*McGauley v. Veterans Administration*, 29 M.S.P.R. 686, 689 (1986) (RIF regulations speak specifically to a demotion rather than a reduction in grade or pay).

Similarly, the appellant's claims that he has been moved from a clinical physician position to a non-clinical physician position do not transform the reassignment into a demotion cognizable under the RIF regulations.

As no RIF action has been taken, the appeal concerns a straightforward reassignment. It is well settled that the Board lacks the authority to review a reassignment which does not involve the loss of pay or grade, either voluntary or involuntary. *See Talley v. Department of the Army*, 50 M.S.P.R. 261, 263 (1991).

As discussed above, the Board generally does not have jurisdiction over Title 38 employees absent an allegation of RIF. Finally, the appellant's bare allegations of wrongs do not bring the reassignment within the Board's jurisdiction. *See Weyman v. Department of Justice*, 58 M.S.P.R. 509, 512 (1993); *Lemon v. Department of Labor*, 44 M.S.P.R. 43, 45 (1990) (the Board does not have jurisdiction over all actions that are alleged to be incorrect).

In summary, I find that the appellant has failed to make a nonfrivolous allegation that the agency demoted him through the reassignment, that he has been subjected to a RIF action, or that he is an employee with appeal rights to the Board. Thus, he has failed to raise a non-frivolous allegation of jurisdiction sufficient to warrant a hearing. Accordingly, the agency's motion to dismiss the appeal must be GRANTED, and the appeal must be **DISMISSED**.

**DECISION**

The appeal is **DISMISSED**.

FOR THE BOARD:

_____

Elizabeth D. Milligan
Administrative Judge

**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

DOM WADHWA,
Appellant,

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DOCKET NUMBER
PH-3443-07-0638-I-1

**DATE:** January 29, 2008

Dom Wadhwa, Philadelphia, Pennsylvania,
pro se.

Stacey Conroy, Esquire, Philadelphia,
Pennsylvania, for the agency.

**BEFORE**
Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

**FINAL ORDER**

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge.

We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d).

Therefore, we **DENY** the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

**NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov.

Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular

relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:
Washington, D.C.

_____

William D. Spencer
Clerk of the Board

## Exhibit A

**United States Merit Systems Protection Board**
**Office of Appeals Counsel**
**Memorandum**

TO: The File
FROM: Edith McGee, Attorney-Adviser

DATE: December 4, 2007

SUBJECT: *Dom Wadhwa v. Department of Veterans Affairs*

MSPB Docket No. PH-3443-07-0638-I-1

Settlement discussions were undertaken in this appeal, but a settlement agreement was not reached.

**Please note:**

**In October 2007, *Impersonator* Telephone Call from an *unknown* agency official at PVAMC claiming to be Petitioner himself and claiming Petitioner had contacted the MSPB hotline for settlement of this U.S. Court of Appeals for the Federal Circuit Case No. 2008-3176, -3177** *(MSPB Docket No. PH-3443-07-0638-I-1)*

**Exhibit B**

**Petitioner's SF-50 from October 15, 2006 from PVAMC which shows under 12 D. Other Pay of $60, 257.**

**Petitioner's SF-50 from January 21, 2007 from PVAMC which shows under 12 D. Other Pay of $ 58, 000.**

**Please note: Petitioner was gone from PVAMC to NIHCS for three workdays only and his salary was reduced by $ 2,257.**

**Exhibit C**

**In Summary, a Ten Member Panel was convened at PVAMC in January 2007 by Petitioner's Supervisors to:**

1. **Remove Petitioner from his over 20-year clinical position**
2. **Demote Petitioner to a nonclinical position**
3. **Reduce Petitioner's Salary**
4. **Deny Petitioner's Performance Pay**
5. **Hire another physician for Petitioner's clinical position, so Petitioner could never return to it.**

NOTE: This order is nonprecedential.

**United States Court of Appeals For The Federal Circuit**

**2008-3176, -3177**

DOM WADHWA,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

**Petition for review** of the Merit Systems Protection Board in PH0752070313-I-1 and PH3443070638-I-1.

**ORDER**

Before Rader, Circuit Judge, Schall, Circuit Judge, and Prost, Circuit Judge.

A petition for **rehearing** having been filed by the Petitioner,

UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, **DENIED**.

FOR THE COURT,
sd/Jan Horbaly
Clerk

Dated: 10/31/2008
cc: Dom Wadhwa
Jeffrey Gauger
WADHWA v. MSPB 2008-3176
(MSPB – PH0752070313-I-1)

NOTE: This order is nonprecedential.

**United States Court of Appeals For The Federal Circuit**

**2008-3176, -3177**

DOM WADHWA,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

**Petition for review** of the Merit Systems Protection Board in PH0752070313-I-1 and PH3443070638-I-1.

**ON MOTION**

Before RADER, SCHALL, and PROST, Circuit Judges.

**ORDER**

Petitioner Dom Wadhwa moves to **stay the mandate**.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is **denied.**

FOR THE COURT:
sd/ Jan Horbaly, Clerk

November 4, 2008

cc: Dom Wadhwa
Jeffrey A. Gauger